MOTION FILED
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No. 10-1303

In the Supreme Court of the United States

AVA HEYDT-BENJAMIN,

Petitioner,

v.

THOMAS HEYDT-BENJAMIN,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF PROFESSORS LINDA D. ELROD AND ROBERT G. SPECTOR AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to this Court's Rule 37.2(b), Professors Linda D. Elrod and Robert G. Spector move to file the accompanying brief in support of the petition for a writ of certiorari. Counsel for petitioner has consented to the filing of this brief but counsel for respondent has not.

The issue presented by the petition—how to determine a child's "habitual residence" under the the Hague Convention on the Civil Aspects of Child Abduction, T.I.A.S. No. 11670 ("Convention" or "Child Abduction Convention"), implemented in the United States in 1988 through the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. §§ 11601-11611—has profound consequences for the prevention of child abduction across international borders. The Convention and ICARA provide that a child who has been abducted across international borders must be returned to the country that is his "habitual residence." Child Abduction Convention art. 1. Once the child has been properly relocated, it is the responsibility of the judicial system of the state of his "habitual residence" to adjudicate the parents' competing claims for rights of custody and access. 42 U.S.C. § 11601(b)(4). This process fulfills the Convention's central purpose of protecting the child's best interests by deterring parents from "removing children to jurisdictions more favorable to their custody claims." *Gitter* v. *Gitter*, 396 F.3d 124, 129 (2d Cir. 2005).

Amicus Professor Elrod was the Reporter for the Uniform Child Abduction Prevention Act, *available at* http://www.law.upenn.edu/bll/archives/ulc/ucapa/2006_finalact.htm; has written a national treatise, *Child Custody Practice and Procedure* (2009), on child custody; and has written numerous articles on child advocacy, child representation, and high-conflict custody cases. She has also served as Editor-in-Chief of the American Bar Association Family Law Section's *Family Law Quarterly* since 1992.

Amicus Professor Spector has been a member of the United States delegation to the Hague Conference on Private International Law for the negotiation of family law treaties since 1994 and is also the Reporter for the Uniform Child Custody Jurisdiction and Enforcement Act, 9 U.L.A. 649 (1997). His Guide to United States Practice Under the Abduction Convention will be published in the 2011 Yearbook of Private International Law.

Amici have a longstanding interest in the interpretation and enforcement of the various Hague Conventions governing child custody and domestic laws enforcing them. They also have a strong interest in persuading this Court to grant review in this case in order to make uniform the approach American courts take to threshold "habitual residence" decisions under the Convention. The present conflict among the circuits and state supreme courts creates opportunities for forum shopping and encourages child abduction.

Amici's brief makes two arguments that do not appear in the petition itself. First, since the Convention affects the United States more than any other nation, conflict among American courts greatly

undercuts the overall administration of the Convention. And because non-American courts rely on American decisions in developing their own law, domestic conflict here unsettles the development of uniform standards elsewhere.

Second, each of the lower courts' conflicting approaches weighs evidence regarding a child's habitual residence in significantly different ways. Consequently, a parent's decision regarding where to relocate with a child within the United States (and therefore where to file a petition in the United States) is often outcome-determinative, which directly contravenes the uniformity that the Hague Conference intended in developing the Convention and that Congress intended in passing ICARA.

For these reasons, *Amici* should be granted leave to file the attached brief and this Court should grant review.

Respectfully submitted.

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INTEREST OF *AMICI CURIAE*[1]

Linda D. Elrod is the Richard S. Righter Distinguished Professor of Law and Director of the Children and Family Law Center at Washburn University School of Law. She focuses her scholarship on high-conflict child custody cases, including abduction, relocation, and alienation issues. She was the Reporter for the Uniform Child Abduction Prevention Act, *available at* http://www.law.upenn.edu/bll/archives/ulc/ucapa/2006_finalact.htm, which together with the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 22514 U.N.T.S. 89, *reprinted in* 51 Fed. Reg. 10,494 (1986), and the Uniform Child Custody Jurisdiction and Enforcement Act, 9 U.L.A. 649 (1997), works to deter parental child abductions. She has authored a national treatise, *Child Custody Practice and Procedure* (2009), and written numerous articles on child advocacy, child representation, and high-conflict custody cases. She has also served as Editor-

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[1] Pursuant to Rule 37.6, counsel for the *amici* certifies that this brief was not authored in whole or in part by counsel for any other party and that no person or entity other than the *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. Counsel of record for respondent received timely notice of *amici*'s intent to file this brief pursuant to Rule 37.2(a) but has not consented to its filing. Counsel for petitioner received timely notice and has consented.

Amici file this brief in their individual capacities and not as representatives of the institutions with which they are affiliated.

in-Chief of the American Bar Association Family Law Section's *Family Law Quarterly* since 1992.

Robert G. Spector is the Glenn R. Watson Chair and Centennial Professor of Law at the University of Oklahoma. He has been a member of the United States delegation to the Hague Conference on Private International Law for the negotiation of family law treaties since 1994 He is also the reporter for the Uniform Child Custody Jurisdiction and Enforcement Act, 9 U.L.A. 649 (1997), and, as such, is charged with incorporating the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, 35 I.L.M. 1391 (1996), into domestic law. His Guide to United States Practice Under the Abduction Convention will be published in the 2011 Yearbook of Private International Law.

Amici have a longstanding interest in the interpretation and enforcement of the various Hague Conventions governing child custody and domestic laws enforcing them.

SUMMARY OF ARGUMENT

The Hague Convention on the Civil Aspects of Child Abduction, T.I.A.S. No. 11670 ("Convention" or "Child Abduction Convention"), implemented in the United States in 1988 through the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. §§ 11601-11611, provides that a child who has been abducted across international borders must be returned to the country that is his "habitual residence." Child Abduction Convention art. 1. Once

the child has been properly relocated, it is the responsibility of the judicial system of the state of his "habitual residence" to adjudicate the parents' competing claims for rights of custody and access. 42 U.S.C. § 11601(b)(4). This process fulfills the Convention's central purpose of protecting the child's best interests by deterring parents from "removing children to jurisdictions more favorable to their custody claims." *Gitter* v. *Gitter*, 396 F.3d 124, 129 (2d Cir. 2005).

Identifying an abducted child's habitual residence is therefore a threshold inquiry in every case arising under the Hague Convention. Yet despite its importance, "habitual residence" is not expressly defined in either the Convention or ICARA. *Koch* v. *Koch*, 450 F.3d 703, 712 (7th Cir. 2006). Consequently, the nine federal courts of appeals that have addressed how to determine a child's habitual residence have, as petitioner describes, Pet. 9-12, developed three starkly different approaches. That "considerable confusion," *Holder* v. *Holder*, 392 F.3d 1009, 1015 (9th Cir. 2004), breaks down as follows: six courts of appeals (the First, Second, Fourth, Seventh, Ninth and Eleventh Circuits) presume that the parents' shared intentions are dispositive, Pet. 9-10; the Sixth Circuit considers only the child's past objective experiences in determining his habitual residence, *id.* at 10-11; and the Third and Eighth Circuits have adopted a hybrid approach incorporating both of these factors, *id.* at 11-12.

This entrenched circuit conflict requires this Court's intervention for at least two reasons. First, since the Convention affects the United States more than any other nation, conflict among American

courts greatly undercuts the overall administration of the Convention. And because non-American courts rely on American decisions in developing their own law, domestic conflict here unsettles the development of uniform standards elsewhere.

Second, each of these approaches weighs evidence regarding a child's habitual residence in significantly different ways. Consequently, a parent's decision regarding where to relocate with a child within the United States (and therefore where to file a petition in the United States) is often outcome-determinative. See *infra*, pp. 12-14. This inconsistency directly contravenes the uniformity that the Hague Conference intended in developing the Convention and that Congress intended in passing ICARA. See 42 U.S.C. § 11601(b)(3)(B) ("In enacting this chapter, Congress recognizes the need for uniform interpretation of the [Hague] Convention."). Encouraging domestic forum-shopping, in turn, facilitates child abduction—the primary evil the Convention aims to suppress. See *Mozes* v. *Mozes*, 239 F.3d 1067, 1071 (9th Cir. 2001) (Hague Convention incorporates term "habitual residence" to prevent forum-shopping and promote uniformity, since it allows determination of the child's habitual residence without using "the idiosyncratic legal definitions of domicile and nationality of the forum where the child happens to have been removed.").

REASONS FOR GRANTING THE PETITION

I. Because More Hague Convention Cases Concern The United States Than Any Other Country And Other Nations Look To American Courts' Interpretation Of The Convention To Help Determine Its Meaning, This Court Should Settle The Deep Conflict Among American Courts

A. The Hague Convention provides the primary means for addressing the wrongful removal or retention of children across national borders. At present, 85 nations are signatories to the Convention. Hague Conference, Status Table, http://www.hcch.net/index_en.php?act=conventions.status&cid=24 (last updated Apr. 19, 2011). Both in raw numbers and relative to population, however, the number of wrongful removal and retention cases under the Convention varies widely from country to country. See Hague Conference, *A Statistical Analysis of Applications Made in 2003 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* ("*Hague Analysis*") 13, Prelim. Doc. No. 3, pt. I (Sept. 2008), *available at* http://www.hcch.net/upload/wop/abd_pd03e1_2007.pdf (documenting the number of applications that each member State has received in a recent year).

By every major metric, the United States is the country most affected by the Convention. In 2003, member nations collectively received 1497 applications for return of or access to children; 345 of these were received by the United States. *Hague Analysis*, *supra*, at 10-11. That is, 23% of all global applications involve the United States—far more

than any other nation. The United States also made the most requests for return or access under the Convention (13% percent of all such requests). *Id.* at 16. That same year, almost 250 American parents were involved in Convention proceedings in the United States. See *Hague Analysis*, *supra*, at 485-487, Prelim. Doc. No. 3, pt. II (Sept. 2008), *available at* http://www.hcch.net/upload/wop/abd_pd03ef2007.pdf.

American courts' dockets reflect the growing impact of Hague Convention proceedings. Federal court decisions involving abduction issues under the Convention have "recently increased dramatically." Merle H. Weiner, *Navigating the Road Between Uniformity and Progress: The Need for Purposive Analysis of the Hague Convention on the Civil Aspects of International Child Abduction*, 33 Colum. Hum. Rts. L. Rev. 275, 276-277 (2002). The official Hague Convention database lists 874 "significant [global judicial] decisions concerning the Convention."[2] Hague Conference, *The International Child Abduction Database (INCADAT) Guide for Correspondents* (2001), *available at* http://www.hcch.net/upload/incadat_guide.pdf. Federal and state courts in the United States are responsible for 123 of these decisions.[3] In addition, American courts decide many less "significant," but nonetheless important,

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[2] The INCADAT database itself is available at http://www.incadat.com.

[3] The database lists 85 cases under "federal jurisdiction," 33 cases under "state jurisdiction," and 5 cases under "general United States jurisdiction." All the cases in this final category were decided by federal courts.

Hague cases every year. The Convention thus affects the United States more than any other country both in terms of nationals as parties and the number of cases in its courts.

B. Given the significant role the United States occupies with respect to the Convention, American judicial decisions interpreting it—including those addressing the meaning of "habitual residence"—have particular influence on other courts across the world. In the past decade alone, for example, courts in Australia, Canada, Israel, New Zealand, South Africa, and the United Kingdom have cited United States appellate opinions interpreting various provisions of the Convention. See, *e.g.*, *MW* v. *Director-General* [2008] HCA 12 (Austl.); *Wilson* v. *Huntley*, [2005] 138 A.C.W.S. (3d) 1107 (Can. Ont. Sup. Ct. J.); FamC (TA) 046252/04 *Ploni* v. *Almonit* [2005] (not reported, 13.1.05) (Isr.)[4]; *Sonderup* v. *Tondelli*, 2001 (1) SA 1171 (CC) ¶¶ 22-23 (S. Afr.) (citing then-Judge Sotomayor's dissent in *Croll* v. *Croll*, 229 F.3d 133, 146 (2d Cir. 2000)); *P* v. *Sec'y for Justice*, [2004] 2 N.Z.L.R. 28 (C.A.); *Re D*, [2006] UKHL 51, [2007] 1 A.C. 619 (U.K.). Uniformity of American law thus matters far beyond the borders of the United States.

The conflict among American courts regarding how to determine "habitual residence" has not gone unnoticed. Some non-American courts follow the child-centered approach, while others adhere to the parental-intent approach. Australia's highest family

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[4] An English-language summary of *Ploni* is available at http://www.incadat.com/index.cfm?act=search.detail&cid=806&lng=1&sl=2

court has approved a trial judge's express application of the Sixth Circuit's child-centered test. See *Cooper* v. *Casey* (1995) 18 Fam. L.R. 433 (Austl.). Adding to the confusion, the High Court of Australia has recently taken a slightly different approach. See *LK* v. *Director General*, (2009) 237 CLR 582 ¶ 28 (Austl.) (parental intent "not to be given controlling weight"). And an Israeli judge—citing Ninth Circuit precedent—has applied the parental-intent standard to conclude that children who lived their entire lives in Venezuela and Paraguay became habitual residents of Israel during a two-month vacation. See *Ploni*, FamC (TA) 046252/04.

Non-American courts' use of American law exceeds mere citation. In *Secretary for Justice*, for example, New Zealand trial and appellate courts disagreed over how to apply the Ninth Circuit's decision in *Mozes* v. *Mozes*, 239 F.3d 1067 (9th Cir. 2001). Quoting *Mozes*, the trial court decided that "the child's initial translocation from an established habitual residence was clearly intended to be of a specific, delimited period" and therefore "refused to find that the changed intentions of one parent led to an alteration in the child's habitual residence." *Sec'y for Justice*, 2 N.Z.L.R. 28 ¶ 129 (quoting *Mozes*, 239 F.3d at 1077). On appeal, Justice Glazebrook noted an inconsistency in *Mozes*, carefully distinguished the facts of that case from the ones before the court, and chastised the trial judge for mechanically applying *Mozes* "without a consideration of the factual matrix." See *id.* ¶¶ 130-132.

Courts outside the United States have also recognized the domestic and international disruptions that circuit splits within the United States

over interpretation of the Hague Convention can produce. In a recent opinion concerning the meaning of "rights of custody" under the Convention, Lord Hope of Craghead wrote extensively about the "mischief" caused by the Second Circuit's outlier approach to that issue and lamented the "profound difference of view between some, although not all, of the courts in North America and the view so widely adopted elsewhere in the common law world." *Re D*, 1 A.C. at 628-630. To remedy this problem, Lord Hope encouraged other courts to follow the dissenting views expressed by then-Judge Sotomayor in *Croll*, 229 F.3d at 1070. See 1 AC at 629.

Given the influence of United States law on other jurisdictions' interpretations of the Convention, this Court's intervention would not only resolve the split among the federal circuits and state supreme courts but would also help unify the law elsewhere. On matters of international significance, the opinions of this Court "are studied with as much attention in New Delhi or Strasbourg as they are in Washington, D.C., or the State of Washington, or Springfield, Illinois." See Justice Sandra Day O'Connor, *Remarks at the Southern Center for International Studies* 2 (Oct. 28, 2003) (transcript available at http://www.southerncenter.org/OConnor_transcript.pdf) (quoting Anthony Lester QC, *The Overseas Trade in the American Bill of Rights*, 88 Colum. L. Rev. 537, 541 (1988)). As a result, this Court's guidance would redound to the benefit of our sister signatories generally and, in particular, to United States parents whose custody disputes arise in other nations.

II. The Three-Way Circuit Split Over How To Determine A Child's Habitual Residence Results In Greatly Inconsistent Application Of The Convention And Encourages Child Abduction

A. The choice of habitual residence test is largely determinative of where a child will continue to live. A simple example illustrates the point: A husband and wife living in the United States with their three-year-old daughter decide to move to Munich, Germany, where the husband has just accepted a job for four years. At the time of the move—which the wife agreed to make only reluctantly—they were both open to the possibility of staying in Germany after the husband's job ended. Neither had a well-formed intention to move back or not to the United States, but they also were not certain that they would want to stay in Germany. The parents' domicile, in other words, remained the United States, but Germany became the family's residence.

For four years, the parents raised their daughter there. They took her on weekly strolls around the English Garden. She enjoyed regular playdates with friends from school and swam with a local children's group during the summers. By age seven, her favorite foods had become bratwurst and potato cakes with applesauce. From the daughter's point of view, Germany was not just her "residence." It was her home. And she wanted to stay there.

As the father's four-year work assignment wound to an end, the parents disagreed about whether the family should remain in Germany—and much else too. The mother, seeing the rich life that had been made for her child in Germany, wanted to keep their

home there. But the father insisted on returning to the United States and looking for a job there. They argued repeatedly over where to live and reached no agreement. One day while the mother was out, the father took the child to the airport and purchased two tickets to the United States. Upon arriving in the United States, the father informed the mother that he would file for divorce and not allow the daughter to return to Germany.

Whether the abducted daughter reunites with her distraught mother or the father's gambit pays off would depend on the United States forum in which the mother relocates with the child and brings a Hague Convention action. A federal district court in Ohio, for example, would apply the Sixth Circuit's child-centric test and conclude that the daughter's habitual residence at the time of the move was Germany. It would conduct a fact-intensive inquiry into the child's objective past experiences, *Friedrich* v. *Friedrich*, 983 F.2d 1396, 1401 (6th Cir. 1993), and determine that she had "been present long enough [in Germany] to allow acclimatization" and that her "presence [there] ha[d] a degree of settled purpose from her perspective," *Jenkins* v. *Jenkins*, 569 F.3d 549, 556 (6th Cir. 2009) (internal citation omitted). Factors indicating such acclimatization would include the child's attendance at school, "social engagements, participation in sports programs and excursions, and meaningful connections with the people and places in the child's new country." *Robert* v. *Tesson*, 507 F.3d 981, 996 (6th Cir. 2007) (internal citation omitted). Under this approach, the parents' last shared subjective intention as to where the child would live long term would be "irrelevant." *Friedrich*, 983 F.2d at 1401. The court would grant

the mother's petition, and child custody proceedings would occur in Germany.

If the mother filed her petition in any of the six circuits that focus only on the parents' last shared intent (unless "unequivocal" evidence showed that the child has acclimatized elsewhere), see Pet. 9-10, she would lose. Because the parents' "last shared intent"—shared no more recently than four years earlier—was to remain in the United States, the daughter's habitual residence would be here. That neither parent had certainly intended to return to the United States and that the daughter preferred Germany would not be "unequivocal" evidence to the contrary. Cf. *Poliero* v. *Centenaro*, 373 Fed. Appx. 102 (2d Cir. 2010); *Gitter* v. *Gitter*, 396 F.3d 124 (2d Cir. 2005); *Ruiz* v. *Tenorio*, 392 F.3d 1247 (11th Cir. 2004). The father would be rewarded for abducting the daughter, who would be uprooted from the only place she had ever really known as home.

Filing the action within the Third or Eighth Circuits would result in the daughter's return to Germany. These circuits employ a hybrid approach to determining a child's habitual residence that "focuses on the child, but also * * * consider[s] the parents' present, shared intentions." *Tsai-Yi Yang* v. *Fu-Chiang Tsui*, 49 F.3d 259, 272 (3d Cir. 2007); *Barzilay* v. *Barzilay*, 600 F.3d 912, 918 (8th Cir. 2010). In this inquiry the child's perspective is highly significant—reflecting "the text of the Convention [which] points to the child's, not the parents', habitual residence," *Silverman* v. *Silverman*, 338 F.3d 886, 898 (8th Cir. 2003) (citing Child Abduction Convention art. 3), as well as "the primary objective of the Hague Convention: to ensure

stability in a child's family and social environment." *Karkkainen* v. *Kovalchuk*, 445 F.3d 280, 291 (3d Cir. 2006). Like the Sixth Circuit, these circuits consider whether the child has acclimatized to a country by examining the child's past experiences and conduct. *Id.* at 292. The court must then also analyze the parents' subjective intentions but accords them significantly less weight than the child's experiences. *Silverman*, 338 F.3d at 898 ("[W]e agree with the Third Circuit that one spouse harboring reluctance during a move does not eliminate the settled purpose from the children's perspective").

B. Such an example vividly illustrates the significance of which test a court applies, and the case law bears that out. Consider *Roche* v. *Hartz*, No. 1:10-CV-1819, 2011 WL 841556 (N.D. Ohio Mar. 7, 2011), decided only two months ago. An American mother and Australian father had two children during the decade they lived in Australia. The parents agreed that the children could accompany the mother on a strictly temporary visit to the United States to help relocate the mother's ailing parent. *Id.* at *1. In an e-mail to friends explaining the visit, the mother wrote that "[w]e intend to stay [in America] for a year, but will give it 6 months[, and] if it is too hard I will return." *Ibid.* The father agreed to temporary extensions of the trip on the mother's promise that "she still intended to eventually reunite the family in Australia." *Id.* at *2. But when the father arrived in America to help "prepare his family for their move back to Australia" he was "greeted by a process server, who served him with divorce papers." *Id.* at *3. The court noted that it could not consider the parents' last shared intentions under Sixth Circuit precedent. *Id.* at *7.

It then concluded that the children had acclimatized to the United States because they attended school and church, participated in extracurricular activities, and developed relationships with friends and cousins there. *Id.* at *6-7. The record was unequivocal, however, that the parents' last shared intention was for the children to live in Australia, *id.* at *2-3, leaving little doubt that Australia would have been the habitual residence in those many circuits in which the parents' last shared intention is effectively dispositive.

Consider as well *Feder* v. *Evans-Feder*, 63 F.3d 217, 219-220, 224 (3d Cir. 1995). Two American parents moved to Pennsylvania with their three-month-old son in October 1990. *Id.* at 218. They lived there together until the end of October 1993, when the father moved to Australia to begin a new job. *Id.* at 219-220. The mother had "deep misgivings" about her marriage and the move and remained with the child in the United States for several months. *Id.* at 219. But "for both emotional and pragmatic reasons"—and "[w]ith great reluctance [and] without any commitment to remain in [Australia], in a last attempt to save her troubled marriage"—the mother and her son moved to Australia in January 1994. *Ibid.*

While in Australia, the son attended nursery school three days a week. 63 F.3d at 219. The mother never changed her driver's license and never "submit[ted] to the physical examination or sign[ed] the papers required of those seeking permanent residency status. All of the Feders[, however,] obtained Australian Medicare cards, giving them access to Australia's health care system." *Ibid.*

The marriage worsened. "Ultimately, Mrs. Feder decided to leave her husband and return to the United States with [her son]." *Ibid.* Believing that her husband would not consent to her return with the son if he knew her plans, she told him that she wanted to travel back to the United States to visit her parents. *Id.* at 219-220. She left with the child on June 29, 1994, and the following month, when her husband made a trip to the United States, she had him served with divorce and custody papers. *Id.* at 220. He then filed a petition for return of the child to Australia.

Both parties agreed that the son's habitual residence had been the United States until at least January, 1994. *Feder* v. *Evans-Feder*, 866 F. Supp. 860, 865 (E.D. Penn. 1994), *rev'd*, 63 F.3d 217 (3d Cir. 1995). The question was "whether the time [the son] spent in Australia, which was slightly less than six months, altered this status." 866 F. Supp. at 865. The district court, citing the Sixth Circuit's child-centric test with approval, *id.* at 864 (citing *Friedrich*, 983 F.2d at 1401), held that the six-month stay had not changed the child's habitual residence. It rejected the father's claims that the child had become settled in Australia, 866 F.3d at 866-868, and noted that the child's parents "viewed Australia differently during the short time they were there." *Id.* at 868. "Mr. Feder may have considered and even established Australia as his habitual residence by June of 1994 despite his history of frequent relocation," the court explained, "but Mrs. Feder assuredly did not." *Ibid.*

The Third Circuit reversed. The panel majority applied a hybrid approach. 63 F.3d at 224. The

parents, it noted, "both agreed to move to [Australia] and live there with one another and their son, and did what parents intent on making a new home for themselves and their child do–they purchased and renovated a house, pursued interests and employment, and arranged for [the child's] immediate and long-term schooling." *Ibid.* The district court, it commented, had "placed undue emphasis on the fact that the majority of [the child's] years had been spent in the United States" and "disregarded the present, shared intentions" of the parents. *Ibid.*

Judge Sarokin dissented. He noted that the court's holding would cause "the child [to] be taken from his mother's home in Jenkintown, [Pennsylvania,] where he has spent virtually all of his years, in contrast to the time spent with his father in Australia." 63 F.3d at 231 (Sarokin, J., dissenting). He also noted "that there is a temporal element to th[e] inquiry. For example, two weeks in Australia certainly would not [have] suffice[d] for [the son] to [have] establish[ed] a habitual residence there, and after two years his mother would have been hard put to argue that [Pennsylvania] remained his home." *Id.* at 230. Given these facts, a court applying the child-centric approach would surely conclude that the United States, not Australia, was the child's habitual residence.

Finally, consider *Ruiz* v. *Tenorio*, 392 F.3d 1247 (11th Cir. 2004). In *Ruiz*, the mother—an American citizen—gave birth to her first child in the United States in 1992. *Id.* at 1249. The father—a Mexican citizen—relocated to the United States and married the mother shortly thereafter. *Ibid.* The couple had their second child in 1998. *Ibid.* After experiencing

some marital difficulties, the couple moved to Mexico in 2000 with their two- and eight-year-old children to try to save their marriage. *Ibid.* Both parents intended this move to be "conditional"—that is, "if it did not work out, the family would move back" to the United States. *Id.* at 1249, 1254. The father moved nearly all of the family's possessions to Mexico and the mother and children obtained tourist visas. *Id.* at 1249. During the next nearly three years, the children continuously attended school in Mexico and developed friendships with Mexican children. *Id.* at 1255. The mother and children visited the United States only twice. *Id.* at 1250. On these visits, the mother opened a bank account and obtained a nursing license in Florida because she "planned on returning." *Ibid.* (internal quotation marks omitted). In May 2003, the mother took the children back to the United States and refused to return them to the father in Mexico, who then filed a petition for wrongful removal. *Ibid.*

The Eleventh Circuit adopted the Ninth Circuit's last-shared-intention test and denied the father's petition. 392 F.3d at 1252-1254. It concluded that the parents never had a shared intention to "abandon the prior United States habitual residence." *Id.* at 1254. Instead, the mother's intention was "clearly conditional." *Ibid.* The mother's decision to retain financial accounts in the United States, have her mail forwarded to an American address, and obtain a nursing license in the United States all bolstered the court's conclusion. *Ibid.* The court did note that "a number of objective facts point toward Mexico. The family did move there. [The husband] did undertake employment. A new house was being built for them. The sojourn in

Mexico was of considerable length." *Id.* at 1255. These facts did not, however, "point unequivocally to a change," *ibid.*, the high standard for overcoming the presumption that the parents' last shared intention controls.

Both the hybrid approach and the Sixth Circuit's child-centric approach would have resulted in the father's petition being granted. At the time of the allegedly wrongful removal, the couple's eleven- and five-year-old children had lived in Mexico for nearly three years. *Ruiz*, 392 F.3d at 1250; cf. *Feder*, 63 F.3d at 224 (holding that six months of time to acclimate to new surroundings is a "significant period of time for a four-year old child"). During their time in Mexico, they had attended Mexican schools and formed friendships with Mexican children. 392 F.3d at 1255. Moreover, the children's paternal grandfather was building a new house in Mexico for the family. *Ibid.* Indeed, the Sixth Circuit itself expressly recognized that this circuit split was outcome-determinative in *Ruiz*, noting that the children's "habitual residence" would be Mexico under a child-centric approach. *Tesson*, 507 F.3d at 991 (comparing how the children's "habitual residence" in *Ruiz* would differ under the competing approaches of the circuit split); see also *ibid.* ("The [last-shared-intention approach] is not only inconsistent with this Court's precedent, but * * * it has 'made seemingly easy cases hard and reached results that are questionable at best.' In *Ruiz* * * *, for example, the Eleventh Circuit applied [the Ninth Circuit's approach] and reached just such a result.") (quoting *Koch* v. *Koch*, 416 F. Supp. 2d 645, 651 (E.D. Wis. 2006), *aff'd on other grounds*, 450 F.3d 703 (7th Cir. 2006)).

These outcomes differ precisely because the parents' last-shared-intention test permits the parents' desire to be overcome only in the "rare" circumstance of "complete" acclimatization. *Daunis* v. *Daunis*, 222 Fed. Appx. 32, 34 (2d Cir. 2007); see also *Mozes*, 239 F.3d at 1079 (holding that "courts should be slow to infer [from evidence of the child's acclimatization] that an earlier habitual residence has been abandoned"). The child-centric approach, however, makes its sole focus the child's acclimatization, without regard to evidence of the parents' intention. *Jenkins*, 569 F.3d at 556 ("To determine the habitual residence, the court must focus on the child, *not the parents*, and examine past experience, *not future intentions*.") (emphasis added) (quoting *Friedrich*, 983 F.2d at 1401).

This lack of uniformity is likely to become more acute in the future. The United States has signed the Hague Convention 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, 35 I.L.M. 1391, a treaty primarily concerned with jurisdiction and judgments in international child custody cases. The primary jurisdictional basis under the treaty is the "habitual residence" of the child, *id.* at 1392, which, in accordance with Hague practices is not defined. When ratified, the 1996 Convention will be implemented through amendments to the Uniform Child Custody Jurisdiction and Enforcement Act, 9 U.L.A. 649 ("UCCJEA"), which will have to be adopted by the states.

In the absence of guidance from this Court, lower courts will apply the conflicting case law of the Child Abduction Convention to give "habitual residence" in the UCCJEA meaning. This will undermine one of the primary goals of the 1996 Convention, which is to make clear that there is one and only one court where jurisdiction is appropriate in any particular child custody case. This confusion over the meaning of one of the UCCJEA's central terms will thus further exacerbate forum-shopping problems, because the determination of habitual residence will not only decide the issue of whether the child is to be returned under the 1980 Convention but also which court will have jurisdiction under the 1996 Convention.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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